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IN THE

Supreme Court of the United States

MARGARET L. HOSTY *et al.*,
Petitioners,

v.

PATRICIA CARTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION; THE COALITION FOR STUDENT & ACADEMIC RIGHTS; FEMINISTS FOR FREE EXPRESSION; THE FIRST AMENDMENT PROJECT; IFEMINISTS.NET; NATIONAL ASSOCIATION OF SCHOLARS; ACCURACY IN ACADEMIA; LEADERSHIP INSTITUTE; THE INDIVIDUAL RIGHTS FOUNDATION; THE AMERICAN COUNCIL OF TRUSTEES AND ALUMNI; AND STUDENTS FOR ACADEMIC FREEDOM IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE WRIT	5
I. THE *HOSTY* DECISION DIRECTLY CONTRADICTS SUPREME COURT PRECEDENT, AND IS INCONSISTENT WITH DECADES OF LEGAL DECISIONS PROTECTING FREE SPEECH ON COLLEGE CAMPUSES, AND LONG-ESTABLISHED CONSTITUTIONAL PRINCIPLES	5
A. The Seventh Circuit grossly underestimated the special importance this Court has placed on free and open exchange in higher education	5
B. The Seventh Circuit mistakenly treated mandatory student activity fees as a conventional government subsidy in conflict with *Southworth* and *Rosenberger*	7
C. The Seventh Circuit erroneously applied *Hazelwood* to colleges and universities despite the profound differences in the nature and purpose of high schools and universities	9
D. The Seventh Circuit relied on an overly mechanistic application of public forum analysis rather than the longstanding presumption that student media is not merely a public forum, but an independent forum	11

TABLE OF CONTENTS—Continued

Page

E. The qualified immunity holding is in direct conflict with Supreme Court precedent clearly establishing prior restraint as the most primitive form of censorship the First Amendment prevents 13

II. THERE IS ALREADY A FREE SPEECH CRISIS ON AMERICA'S COLLEGE CAMPUSES AND, IF ALLOWED TO STAND, THE *HOSTY V. CARTER* DECISION WILL SERIOUSLY EXACERBATE THE EXISTING PROBLEM 16

CONCLUSION 20

APPENDIX: LIST OF PARTIES TO BRIEF *AMICI CURIAE* 1a

TABLE OF AUTHORITIES

CASES	Page
Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970)	12, 15
Bair v. Shippensburg University, 280 F. Supp. 2d 357 (M.D. Pa. 2003)	18
Beach v. University of Utah, 726 P.2d 413 (Utah 1986)	11
Bethel School District v. Fraser, 487 U.S. 675 (1986)	11
Board of Regents v. Southworth, 529 U.S. 217 (2000)	2, 3, 7, 8
Booher v. Board of Regents, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998)	17
Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979)	10
Bystrom v. Fridley High School, 822 F.2d 747 (8th Cir. 1987)	10
Dambrot v. Central Michigan University, 839 F. Supp. 477 (E.D. Mich. 1993)	17
Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989)	17
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)	*passim*
Healy v. James, 408 U.S. 169 (1972)	6, 10
Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005)	*passim*
Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973)	12
Keyishian v. Board of Regents of the University of New York, 385 U.S. 589 (1967)	6, 11
Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001)	6, 10
Kunz v. New York, 340 U.S. 290 (1950)	14
Linnemeier v. Indiana University—Purdue University Fort Wayne, 155 F. Supp. 2d 1034 (N.D. Ind. 2001)	6
Lovell v. Griffin, 303 U.S. 444 (1938)	14

TABLE OF AUTHORITIES—Continued

	Page
Mazart v. State, 109 Misc. 2d 1092, 441 N.Y.S.2d 600 (N.Y. Ct. Cl. 1981)	11, 15
National Endowment for the Arts v. Finley, 524 U.S. 569 (1998)	8
Near v. Minnesota, 283 U.S. 697 (1931)	14
New York Times Co. v. United States, 403 U.S. 713 (1971)	14
Niemotko v. Maryland, 340 U.S. 268 (1950)	14
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	14
Papish v. Board of Curators of the University of Missouri, 410 U.S. 667 (1973)	6
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)	17
Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004)	18
Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995)	*passim*
Rust v. Sullivan, 500 U.S. 173 (1991)	8
Saucier v. Katz, 533 U.S. 194 (2001)	13
Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975)	10, 12
Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983)	10, 12
Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)	5, 6, 7
The UWM Post, Inc. v. University of Michigan, 774 F. Supp. 1163 (E.D. Wis. 1991)	17

OTHER AUTHORITY

David E. Bernstein, *You Can't Say That! The Growing Threat to Civil Liberties from Antidiscrimination Laws* (2003)	17
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TABLE OF AUTHORITIES—Continued

Page

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Alan Charles Kors, Keynote Address to Phi Beta Kappa of Delaware County (Oct. 13, 2004) 19

Mary Beth Marklein, *Students are Giving Colleges a Lesson in Free Speech*, USA Today, May 19, 2003 18

Memorandum from Christine Helwick, General Counsel, California State University, to CSU Presidents (June 30, 2005) 19

John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing* (1644) 14

TABLE OF AUTHORITIES—Continued

Page

2002 U.S. Census Bureau Current Population Survey Report, Table A-6, "Age Distribution of College Students 14 Years Old and Over, by Sex: October 1947 to 2002" 10

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INTEREST OF *AMICI CURIAE*

Amici curiae[1] represent a broad national coalition of groups concerned with free speech and academic freedom on the

[1] A complete list of the *Amici* is set out in Appendix A. Pursuant to S. Ct. R. 37.6, the *Amici* state that no counsel for a party to this action

nation's college and university campuses. For all the reasons stated below *Amici* believe the Seventh Circuit's opinion in *Hosty v. Carter* was wrongly decided and poses a serious threat to universities ability to function as a true "marketplace of ideas."

SUMMARY OF ARGUMENT

The Seventh Circuit's *en banc* decision in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) is a grave threat to academic free speech and endangers the very existence of independent college media. *Hosty* directly contradicts recent Supreme Court precedent as well as decades of legal decisions protecting free speech on college campuses, and is irreconcilable with fundamental constitutional principles. The decision also conflicts with decades of opinions protecting the student press in other U.S. courts of appeals and opens the door to an unparalleled erosion of college student rights.

In *Hosty*, the Seventh Circuit treated mandatory student fees as a conventional government subsidy that could entitle a public university to control the speech of student fee recipients. This decision is diametrically opposed to this Court's decisions in *Board of Regents v. Southworth*, 529 U.S. 217 (2000), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Under *Southworth* and *Rosenberger*, student fees are not considered to be part of a university's discretionary funds but rather constitute a pool of student money "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. This decision, however, will force students to pay into a student activities fund earmarked for a student-run newspaper only to have

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authored any portion of this brief *amici curiae* and that no person or entity, other than the *Amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

their fees used to finance an administration mouthpiece. *Hosty* turns what this Court rightly considered student money into governmental money that the government may use to promote its own message and exclude student opinions it dislikes—precisely the opposite of what this Court intended in *Rosenberger* and *Southworth*.

Moreover, the Seventh Circuit erred in applying the standard set forth in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)—a standard formulated for high school students—to adult college students. As the dissenting judges in *Hosty* so compellingly pointed out, in applying *Hazelwood*, the Seventh Circuit ignored both the profound differences between high school students and college students and the distinct missions of high schools and colleges. This Court has long recognized that universities should actively work to *facilitate* free speech and the free exchange of ideas. High schools—for all their many virtues—simply do not have the same historical and societal purpose.

The Seventh Circuit also erred in mechanistically applying forum analysis to a collegiate student newspaper. For decades, the independence of the student media and student groups had largely been presumed by courts. Under *Hosty*, however, once a student publication or student group is deemed to be "subsidized"—a dangerously vague term that could potentially include virtually all collegiate student groups—the administration then has the right to decide whether it is granted public forum or non-public forum status. If the administration designates the group as a non-public forum, the administration may engage even in explicit viewpoint discrimination if that decision is considered "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. This remarkably deferential standard provides all students with precious little, if any, real protection from censorship.

Furthermore, the Seventh Circuit's decision to grant qualified immunity to a public employee who demanded the power of prior restraint over a student newspaper ignores this Court's precedent clearly establishing prior restraint as the most egregious form of censorship the First Amendment exists to prevent.

Finally, outside the world of legal theory, the *Hosty* decision will compound an already existing free speech crisis on America's college campuses. For decades, college administrations have demonstrated a persistent, determined desire to limit free speech and open debate on campus. Hundreds of colleges have enacted speech codes that suppress undeniably protected speech. Universities have abused student fee systems to deny associational rights to disfavored groups, established "free speech zones" and other highly restrictive regulations, and too often have refused to prevent student mob censorship. Fortunately, federal courts and agencies[2] have limited administrative control over free expression to maintain the unique status of college campuses as a "marketplace of ideas." *Hosty* is a step in the opposite direction. It dangerously increases administrative discretionary powers over speech while decreasing administrative accountability.

If allowed to stand, *Hosty* will have numerous, specific, predictable, and far reaching negative consequences for free speech and robust debate on America's college campuses. The *Hosty* decision threatens the very existence of independ-

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[2] *See* First Amendment: Dear Colleague Letter from Gerald A. Reynolds, Assistant Secretary, Office for Civil Rights, U.S. Department of Education (July 28, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html ("No OCR regulation should be interpreted to impinge upon rights protected under the First Amendment to the U.S. Constitution or to require recipients to enact or enforce codes that punish the exercise of such rights. There is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment.")

ent collegiate media as well as the independence of student groups; it re-opens issues relating to collegiate liability for student media and student groups formerly considered settled; and, it allows administrators great freedom to experiment with censorship. Finally, due to the tendency of public college principles to guide private college policies, the threat *Hosty* presents to campus speech will not likely be limited to public campuses. For these reasons, this Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. THE *HOSTY* DECISION DIRECTLY CONTRADICTS SUPREME COURT PRECEDENT, AND IS INCONSISTENT WITH DECADES OF LEGAL DECISIONS PROTECTING FREE SPEECH ON COLLEGE CAMPUSES, AND LONG-ESTABLISHED CONSTITUTIONAL PRINCIPLES.

A. The Seventh Circuit grossly underestimated the special importance this Court has placed on free and open exchange in higher education.

This Court has long emphasized and understood the importance of free and open expression on campus:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).